



April 23, 2001

Mr. Joe A. De Los Santos  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246-0606

OR2001-1608

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146283.

The Hays Consolidated Independent School District (the "school district"), which you represent, received a request for information relating to the school district's Alpha H program as well as information relating to a reading contest held at an elementary school. You state that you have released information relating to the requestor's children and the general acceptance criteria for the Alpha-H Program. However, you claim that the information that you have submitted to this office is excepted from disclosure under sections 552.026, 552.101, 552.110, 552.114, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that it is unclear whether you have submitted to this office all of the responsive information that you have not otherwise released to the requestor. It appears you submitted information responsive to only the request for information relating to the Alpha H program. Furthermore, while you indicate that the information submitted consists of a representative sample of the requested information, it is not clear that the sample is representative of the information responsive to the request for information regarding the reading contest. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. To the extent you did not submit a copy or representative sample of all of the information you seek to withhold, you have not complied with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.122 of the Government Code is a discretionary exception and therefore cannot provide a compelling reason for overcoming the presumption of openness. *See Gov't Code* § 552.007(a); Open Records Decision No. 522 at 4 (1989). However, the remaining exceptions you raise can provide a compelling reason for overcoming the presumption of openness. Therefore, with respect to any information you seek to withhold that is substantially different from the submitted sample of information, we will address only your arguments under sections 552.026, 552.101, 552.110, and 552.114 of the Government Code.

First, we address your argument under section 552.122 with respect to the submitted representative sample of information. You argue that certain assessment instruments are excepted from disclosure under section 552.122(b) of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Although the submitted assessment instruments appear to be "test items," they were not developed by the school district. Therefore, we find that section 552.122 does not except these assessment instruments from disclosure.

Nevertheless, you also contend that the assessment instruments are excepted under section 552.110. Accordingly, you indicate that you have informed several third parties of their right to submit comments to this office, including Riverside Publishing Company, Psychological Corporation, and American Testronics, in accordance with section 552.305 of the Government Code. However, as of the date of this ruling, we have received arguments from only Riverside.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

You contend that the assessment instruments are excepted under section 552.110(b) because, if released, the school district would be forced to seek alternative testing devices thus causing the companies who provided the requested testing devices substantial competitive harm. However, while the school district has demonstrated that release of the requested assessment

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<sup>1</sup> The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

instruments could cause it to seek alternative testing devices, it has not adequately demonstrated that the companies who provided the requested "nationally developed testing devices" would suffer "substantial competitive harm" as a result. Therefore, we find that the school district has not demonstrated that the assessment instruments are excepted from disclosure under section 552.110(b).

Representatives for Riverside have submitted additional arguments that their client's information is excepted under both prongs of section 552.110. Riverside states that disclosure of its test items in the possession of the school district "could impair the validity of the set of questions administered in the District and the future market value of the Tests in school districts in Texas and in other states because of the potential that students could be taught the test in advance." Riverside further states that if its tests are released to the public, it would have to expend "[t]remendous amounts of money and effort ... to prepare new versions of the Tests and while that is being done the market for the current versions of the Tests would not exist due to the fact that the integrity of the Tests has been compromised by their public release." Based on Riverside's assertions and our review of its information, we find that Riverside has adequately demonstrated that release of its assessment materials would cause it substantial competitive harm. Therefore, the school district must withhold Riverside's assessment materials under section 552.110(b). Because the school district did not adequately demonstrate that the remainder of the responsive information is excepted under section 552.110, and we received no other arguments regarding this information, we find that the school district may not withhold any of the remaining responsive information under section 552.110. We have marked the submitted information that must be withheld under section 552.110.

Next, you argue that the requested information regarding students and their ethnic make-up is protected under sections 552.026, 552.101, and 552.114 of the Government Code. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

You contend that the requested information regarding the ethnic make-up of schools and the Alpha-H program constitutes student records. We agree that these records contain information directly related to students and therefore constitute student records. You further contend that "[g]iven the size of Alpha H program, the break down information by campus, and the small numbers of some ethnic groups, the District believes that releasing such information would make the identities of these students easily traceable." We first note that the submitted records contain reports on the amount of students in each school in the school district compared with the amount of students in the Alpha-H programs in those schools. You have not demonstrated, nor is it apparent, how this information would tend to reveal the identity of any student. The remainder of the student records detail the ethnic make-up of each of the schools within the school district as well as the Alpha-H programs within those schools. Furthermore, the reports provide only figures concerning the ethnic make-up of those schools. There is no other information relating to the students that is included in the reports. Based on our review of the ethnic reports, we cannot conclude that any portion of the submitted reports must be withheld in order to avoid personally identifying a student. *See* 34 C.F.R. § 99.3 ("Personally identifiable information includes, but is not limited to ... [a] list of personal characteristics that would make the student's identity easily traceable; or ... other information that would make the student's identity easily traceable."). Therefore, you may not withhold any of the submitted reports under FERPA or sections 552.026 or 552.114 of the Government Code.

With respect to any student records that are responsive to the requests for information but that are substantially different from the representative sample of information submitted to this office, information that identifies students in those records is excepted from disclosure under FERPA and section 552.114 of the Government Code, and the school district need not request a decision from this office to withhold such information.<sup>2</sup>

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<sup>2</sup>However, as you correctly note, the requestors have a special right of access to information regarding their own children. 20 U.S.C. § 1232g(a)(1)(A); *see* Open Records Decision No. 431 (1985) (Public Information Act's exceptions to required public disclosure do not authorize withholding of "education records"

In summary, the school district must withhold Riverside's assessment materials under section 552.110(b). The school district must release the remainder of the submitted information. Furthermore, the school district must release any other responsive information that is substantially different from the representative sample of information submitted to this office, except to the extent that the information is protected under FERPA and section 552.114 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

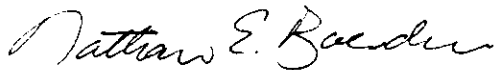
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from adult student).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Nathan E. Bowden".

Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/rr

Ref: ID# 146283

Encl: Submitted documents

cc: Mr. Gregory Hampton  
200 Appleton Court  
Buda, Texas 78610  
(w/o enclosures)